tion of costs; or make any order in conflict with that already given by the learned Judge.

The words used by Prichard, J., in his order (which is the equivalent to a decree) were "costs of all parties *to this suit.*"

This point was considered in *Quarrell* v. *Beckford* [(1816) 56 E.R. at p. 106] by Sir Thomas Plumer, V.C. who said:—

> "What are the costs of the suit? Costs up to the Decree? Certainly not. If so intended it would have been said costs up to the decree. If the decree had reserved the question of subsequent costs up to this time, that would have left the Court at liberty, on further directions, to consider what ought to be done with the subsequent costs; but I think as to that part of the case the decree is conclusive."

In these circumstances, I have no alternative but to give effect to the order of Prichard J., and order that the costs of all parties to the suit be taxed as between solicitor and client and be paid by Wan Mohamed Noor as administrator *de bonis non* of the estate of *Wan Ahmad Nasir* (deceased). *Order accordingly.*

[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

April 23, 1935.

NGAN KHONG.....Plaintiff

v.

RAMAH BINTI PAKEH JAMIN

RASID BIN LUHA.....Defendants

[PERAK CIVIL SUIT No. 6 of 1935]

The Land Code, 1926, section 134—Lien—Not created by original holder of promissory note—Right of transferee of promissory note to create a lien—Meaning of "lien."

The failure of the original holder of a promissory note to present a caveat and create a lien in respect of extracts from the mukim register deposited with him as collateral security does not prevent the transferee of such promissory note from so doing.

"Lien," in the Land Code, 1926, is a right of an active nature over land, analogous to an equitable mortgage, and means something quite different from the meaning assigned to "lien" in English law.

G. Terrell for the Plaintiff.

E. C. Watson for the Defendants.

Cur. adv. vult.

HOWES, J.—In this summons, the first defendant applies for an order that a caveat lodged by the plaintiff, and registered at his instance on the 22nd July, 1932, should be withdrawn, under Section 170 of the Land Code, 1926.

As a preliminary, I consider the procedure adopted, in issuing the summons in the course of the suit, was wrong; and that properly, the defendant should have issued an Originating Summons, as this application is made independently of the suit. However, rather than waste the time and money of the parties, in insisting on a fresh summons being taken out, I will deal with the application.

The facts of the case are as follows:

The two defendants on the 7th January, 1932, gave a promissory note for $840/- in favour of one Yap Hong Khai and as collateral security, the first defendant deposited four extracts from the mukim register Nos. 2585, 3297, 2440 and 3666 Chenderiang.

On the face of the promissory note these numbers are quoted as "being deposited as collateral security."

Yap Hong Khai did not present a caveat in respect of the above extracts under Section 166 of the Land Code, and therefore no "lien" over the land was ever created in his favour; but the extracts remained in his custody.

On the 11th July, 1932, Yap Hong Khai, by endorsement, transferred the promissory note to the present plaintiff, Ngan Khong, "absolutely." No mention was made of the collateral security, but the four extracts were deposited by him with the plaintiff.

Notice of the transfer of the promissory note to Ngan Khong was given to the defendants, and subsequently, they have paid interest to the present plaintiff amounting to $209.91.

Ngan Khong, on the 22nd July, 1932, presented a caveat in respect of the four extracts, which was duly registered. The first defendant now applies for an order that this caveat shall be withdrawn.

The defendants do not deny the rights of the plaintiff to payment under the promissory note, but Mr. Watson, for them, argues that as the original holder of the promissory note had no lien over the land, the plaintiff acquired no title to the land and that the registering authority was misled and should not have registered the caveat.

Mr. Watson contends that under Section 134 (i) of the Land Code the only person who can create a lien over land by presenting a caveat, is "the person with whom the same (i.e., the extract) has been deposited;" and only after registration of such caveat is the lien created.

He seeks to limit the right to present a caveat, to the original depositee of the titles. He does not deny that the titles were handed to the plaintiff by the original holder of the promissory note at the time of transfer.

He refers to the case of *Palaniappa Chetty* v. *Dupire Brothers*, 1 F.M.S.L.R. 370 in which the definition of "lien" in *Halsbury's* Laws of England Volume 19, page 2 was quoted at page 377 in the judgment of Whitley, J.C.:

> "'Lien' in its primary sense is the right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied."
>
> Applying this definition to the present case, appellant had the right to retain grant No. 5138 until the loan in respect

of which it was deposited was repaid. This right of retention is inconsistent with the exercise by the registered proprietor of his right to deal with the land. The registered proprietor therefore, has, for the purposes of the lien, surrendered that right. It follows, I think, that he has pledged the land as security for the loan, and has conferred upon the lien-holder a right analogous to that possessed by an equitable mortgage in countries where such mortgages are recognised."

Mr. Watson further quotes *Halsbury* Vol. 19, p. 3, where it is stated that a lien cannot be assigned. This, of course, is perfectly correct according to English law, under which, ordinarily, a lien is a right generally of a passive nature, to retain goods by a vendor or bailee for the price of the goods, or the value of the work and labour spent upon them.

In my view, the English definition of lien has no bearing on the "lien" referred to in the Land Code, where, although there is no definition of the word, it has a special meaning, and is a right of an active nature over land, (analogous to an equitable mortgage) and gives the lien-holder the right to obtain from the Court, an order for the sale of the land in respect of which, by registration of a caveat, his "lien" has been created.

It is not disputed that in the present case, the four titles were deposited with the original holder of the promissory note as collateral security. Nor is the latter's right to transfer the promissory note questioned. Does the right to the security pass with the promissory note? This question has been touched upon, but not decided. See *Storm* v. *Starling*, (1854) 3 E. & B. 832. I hold that it does.

Admittedly, at the time of the transfer of the promissory note, the original holder, since he had not presented or registered a caveat, had no "lien" within the meaning of the Land Code, as such is only created upon registration of the caveat. See section 134 (i).

At the same time, however, since there is evidence of an intention on the part of the first defendant to create a "lien" over her land (by reason of the deposit of the four titles) the original holder of the promissory note acquired, under Section 134 (i) of the Land Code, a right to present a caveat.

This right, in view of what would have been the consequences had he exercised it, (viz., he could have obtained an order for sale of the land) differs considerably from a bare lien, or right to retain the titles, which is all he would have acquired according to English law, and is the creature of Enactment. For this reason, it seems to me that reference to English law on the subject of common-law liens is of no assistance and only leads to confusion; as the right of the person with whom the title has been deposited to present a caveat, is statutory.

Had the original holder of the promissory note presented a caveat, and thereby created a "lien" before transfer of the note; it is not suggested that the transferee could not have substituted himself as caveator.

In this event, presumably, the procedure would have been for the original holder of the promissory note to have withdrawn his caveat, and for the transferee to have presented a fresh caveat, there being no provision in the Land Code for transfer of caveats. Between these two transactions, there would be a theoretical interval, during which there was no caveat on the register; and the right of the transferee to present one, would only arise from the fact that the titles were deposited with him with the intention of creating a "lien."

The whole question appears to me to be this: Does the right to present a caveat (the English law of the lien has no bearing on the point) which is given by the Land Code to the person with whom titles are deposited, pass to the transferee of an instrument by which this right arose?

Clearly, his right is only in the person with whom the titles are deposited, and arises from the fact of the deposit of the titles. Section 134 (i) does not limit the right to the first (or original) depositee.

This right arose from the promissory note on which it was recorded that the titles had been deposited as collateral security, and is wedded to the promissory note. It seems to me to follow that on transfer of the promissory note the right automatically passes to the transferee; otherwise, in this country where the practice of depositing titles with the holder of a promissory note as security is general, the negotiability of these instruments would be seriously hampered.

In the ordinary course, all the rights of the original holder of a promissory note pass to the transferee, and this right to present a caveat was certainly one possessed by the original holder, although he never exercised it, and therefore it also passed with the note.

The right of the present plaintiff to present a caveat, arose from the fact that he was the depositee of the titles, and holder of the promissory note. There is no time limit for presenting a caveat; and I can see no difference between the present case and the hypothetical case I have suggested, in which the original holder had lodged a caveat and desired to substitute his transferee, and where, for a theoretical (if not a practical) interval of time, there is no caveat on the register.

I therefore hold that the plaintiff has shown cause why the caveat should not be withdrawn, and this summons must be dismissed with costs.

Summons dismissed.